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No. 99-1847

Supreme Court, U.S.
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In The

Supreme Court of the United States

WILLIAM C. DEWBERRY,

Petitioner,

vs.

TEXAS UTILITIES ELECTRIC COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

CHARLES W. MCGARRY
Counsel of Record

LAW OFFICE OF CHARLES MCGARRY
900 Jackson Street, Suite 600
Dallas, Texas 75202
(214) 748-0800

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REASONS FOR GRANTING THE WRIT

I. This Court's Recent Decision in *Reeves v. Sanderson Plumbing Products, Inc.* Requires the Granting of this Petition.

Less than a month after this petition was filed, this Court issued its decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000). *Reeves* directly addresses the primary issue raised in this petition, and resolves it in Petitioner's favor.

Reeves, like this case, is an employment discrimination case arising out of the Fifth Circuit. The issue presented in *Reeves* is "whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a *prima facie* case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action." *Reeves*, 120 S. Ct. at 2103. This petition presents the identical issue.

Reeves resolves a conflict among the circuits on this issue. Several circuits had held that a *prima facie* case combined with sufficient evidence to reject the employer's explanation always creates a jury issue on intentional discrimination. *Reeves*, 120 S. Ct. at 2104-05 (and cases cited therein). The Fifth Circuit, on the other hand, had required additional direct evidence that the employer's real reason for its action was discrimination. *Id.*, *citing Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc). This petition cites the same conflict.

In *Reeves*, this Court expressly rejects the Fifth Circuit's requirement of additional direct evidence of

discrimination, and criticizes that Circuit for proceeding from "the assumption that a *prima facie* case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination." *Reeves*, 120 S. Ct. at 2108. *Reeves* goes on to explain that "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.*

In this case, as in *Reeves*, the Fifth Circuit held that the defendant employer was entitled to judgment as a matter of law because the plaintiff did not have any independent evidence of discrimination. (See Appendix A-14, A-17, A-19, A-23). Although the district court found that the plaintiff had established a *prima facie* case of discrimination (A-12, A-15, A-18), both the district court and the Fifth Circuit found it completely unnecessary to determine, or even to address, the issue of whether the defendant's articulated nondiscriminatory explanations for its decisions were false. Under *Reeves*, the lower courts' analyses are clearly erroneous, and this petition should be granted. "It suffices to say that, because a *prima facie* case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce independent, additional evidence of discrimination." *Reeves*, 120 S. Ct. at 2109.

II. This Court Should Decline Respondent's Invitation to Uphold the District Court's Summary Judgment on a Ground that was Never Addressed by Either the District Court or the Fifth Circuit.

In an attempt to bring this case within the requirements of *Reeves*, the Respondent argues that "the district court, with affirmance by the Fifth Circuit, found that Petitioner failed to create a fact issue as to pretext and presented no evidence that he was not promoted because of his race. . . . " *Brief in Opposition*, p. 13. This assertion is false and misleading in pertinent part. The district court's opinion *never* addresses the issue of whether there is sufficient evidence for the trier of fact to disbelieve the defendant's stated explanation. Instead, relying on the then-controlling Fifth Circuit precedent, the district court looked only for evidence: (a) that "race was the real reason for Respondent's failure to promote" (Appendix A-14); (b) of discriminatory intent (Appendix A-17, A-19); and (c) of racial animus (Appendix A-17). Just as the Fifth Circuit did in *Reeves*, the district court, in making this determination, "ignored the evidence supporting petitioner's *prima facie* case and challenging respondent's explanation for its decision." *Reeves*, 120 S. Ct. at 2108.

The Respondent nevertheless argues that this petition should be denied because "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Brief in Opposition*, p. 12, *citing Reeves*, 120 S. Ct. at 2109. Although it is well-established that an appellate court *may* affirm a judgment on grounds other than those relied upon by the lower court, *Helvering v.*

Gowran, 302 U.S. 238, 58 S. Ct. 154, 82 L. Ed. 224 (1937), it is also clear that an appellate court may decline to address an issue in the first instance. *See, e.g., Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253 (1999).

This Court should decline to review an issue on which neither the district court nor the Fifth Circuit has ruled. It should do so both to conserve its own judicial resources and to provide an early test of how the courts within the Fifth Circuit will apply *Reeves*. Doing so would permit this Court to simply grant the petition, reverse the judgment of the Fifth Circuit, and remand the case for further consideration in light of *Reeves*.

III. There is Sufficient Evidence for a Jury To Disbelieve Respondent's Stated Explanation for Not Promoting Petitioner.

A. How Can a Court Determine a Fact Issue to be "Weak" When it Cannot Weigh Evidence on Summary Judgment?

In the event that this Court chooses to determine whether there is sufficient evidence for the trier of fact to disbelieve the respondent-employer's stated explanations for its employment decisions, then it should take the opportunity to resolve what appears to be a lingering inconsistency in the standard set forth in *Reeves*.

Reeves reaffirms the long-standing summary judgment rule that a court "may not make credibility determinations or weigh evidence." *Reeves*, 120 S. Ct. at 2110. It emphasizes that "the weighing of evidence, and the drawing of legitimate inferences from the facts are jury

functions, not those of a judge." *Id.* Nevertheless, *Reeves* also states that judgment may be granted as a matter of law when a plaintiff creates "only a weak issue of fact as to whether the employer's reason was untrue and there [is] abundant and uncontroverted independent evidence that no discrimination [has] occurred." How can a court, on summary judgment, determine that a fact issue is "weak" without weighing evidence?

It is respectfully submitted that a court may not, consistent with the summary judgment standard, determine that a fact issue is weak or strong. Either a fact issue for the jury exists, or it does not. The reference to a "weak" fact issue on the falsity of the employer's explanation is also superfluous and unnecessary for this Court to set forth the proper circumstances under which the falsity of an employer's explanation will not permit an inference of intentional discrimination. There are two such circumstances: (1) the evidence conclusively establishes that the employer's explanation is a pretext for another, nondiscriminatory reason; and (2) there is independent and uncontroverted evidence negating discrimination. *See Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1291-92 (DC Cir. 1998) (en banc). Under either of these circumstances, it does not matter whether evidence of the falsity of the employer's explanation is strong or weak. Either way, discrimination has been conclusively negated and the employer would properly be entitled to judgment as a matter of law. Clarifying the holding of *Reeves* in this manner should also satisfy the concerns expressed by Justice Ginsburg in her concurring opinion in *Reeves*. *See, Reeves*, 120 S. Ct. at 2112 (J. Ginsburg, concurring).

B. Respondent's Articulated Non-Discriminatory Reasons are False.

Respondent's presentation of evidence in support of its nondiscriminatory explanations fails to properly apply the summary judgment standard of review, and fails to focus on the evidence that is relevant under *Reeves*. For example, Respondent relies heavily on Petitioner's candid admissions that he has no direct evidence of discrimination, just as the district court did. *Brief in Opposition*, pp. 15, 25. However, the very point of *Reeves* is that such evidence is not required. *Reeves*, 120 S. Ct. at 2109.

Respondent also argues, citing now-questionable Fifth Circuit authority, that a finding of discriminatory intent requires a "substantial disparity" in the qualifications of the candidates, while Petitioner's qualifications were merely comparable. *Brief in Opposition*, p. 18. However, Respondent's admission that Petitioner's qualifications were comparable to the selected candidates is sufficient evidence to permit a jury to disbelieve Respondent's stated explanation that it had doubts about his competency. This is all that is required under *Reeves*.

Respondent also argues, again citing now-questionable Fifth Circuit authority, that "a plaintiff cannot raise fact issues simply by attacking the employer's stated business reasons for its actions, but must instead demonstrate a nexus between the employment action and the alleged unlawful discrimination." *Brief in Opposition*, p. 19. This argument appears to fly in the face of the main holding in *Reeves*, which is that the falsity of the employer's reason alone, with a *prima facie* case, permits a finding of discrimination in most cases *without* requiring

additional evidence showing discrimination. *Reeves*, 120 S. Ct. at 2109.

Respondent also relies heavily on the testimony and subjective opinions of its own management personnel. *Brief in Opposition*, pp. 14, 18, 21, 23, 24, 26, 27. It also relies on allegations concerning conduct that occurred *after* the employment decisions were made, as if that could be relevant under any standard. *Brief in Opposition*, pp. 22-23.

Under a proper application of the summary judgment standard, a court "must disregard all evidence favorable to the moving party that the jury is not required to believe. [citation omitted]. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.' " *Reeves*, 120 S. Ct. at 2110.

Respondent has no disinterested witnesses, and the testimony provided by its management personnel was sufficiently contradicted or impeached to permit a jury to disbelieve it. Moreover, many of Respondent's interested witnesses claim to have relied on their own, unidentified personal experiences with the Petitioner, which a jury should not be compelled to believe.

Petitioner relies on the summary of the evidence and arguments showing the falsity of Respondent's explanations contained in his original petition.[1] *Petition for Writ of Certiorari*, pp. 11-13.

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[1] To the extent that its accuracy is challenged, Petitioner makes the following brief reply: Respondent states that

C. Petitioner's *Prima Facie* Case is Particularly Strong.

In addition to evidence casting doubt on the veracity of the employer's stated explanations for its decisions, the strength of the plaintiff's *prima facie* case is also a factor is determining whether an employer is entitled to judgment as a matter of law. *Reeves*, 120 S. Ct. at 2109. The Petitioner's *prima facie* case is particularly strong.

Respondent did not contest Petitioner's *prima facie* case for the Central Region Lead Technician positions, or the Mesquite Lead Technician position. What makes Petitioner's *prima facie* case particularly substantial, however, is that he is arguably far *more* qualified for these positions than the persons selected. After all, he had successfully handled far more technical responsibilities than the other candidates, and he was responsible for far more of Respondent's most important, high-profile customers. He was also apparently the only candidate with experience in resolving customer complaints, a key added responsibility to the new positions.

Respondent challenged Petitioner's *prima facie* case for the Distribution Supervisor position solely on the ground that he was unqualified. Respondent argued that the position required prior supervisory experience that

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Petitioner has misled the Court regarding the timing of Petitioner's performance review, which stated that he was "ready for advancement." *Brief in Opposition*, p. 18, n.14. However, the petition states, accurately, that the review covered the same period of time in which Petitioner was being denied promotion. It does not contend that the review occurred before Petitioner's complaint.

Petitioner did not have. However, Respondent admitted that the written job notice contained the required qualifications, and supervisory experience was not listed. Petitioner met the qualifications Respondent listed, and the district court correctly held that there was a *prima facie* case.

Another factor making Petitioner's *prima facie* case particularly strong is the fact that the same individual, Ralph Reeves, was responsible for hiring three of the lead technicians as well as the distribution supervisor. This is the individual who originally didn't even want to interview an African-American for the supervisor post, and who passed up all three African-Americans in a pool of only eleven for the three lead technician posts. This Court has cited as an example of a weak *prima facie* case a situation in which the hiring officer, as well as 40% of the employer's work force, were members of the same minority group as the plaintiff, even though the group in question comprised only 10% of the relevant labor market. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 513 (1993). This case is almost the opposite: in one case, an all-white hiring committee, after bypassing Respondent's personnel department, passed over African-Americans who made up more than a quarter of the hiring pool, in order to give promotions to more than a quarter of the hiring pool. In another case, African-Americans were initially excluded from interviewing at all, and a token, unqualified African-American was added at the last minute.

The strength of Petitioner's *prima facie* case, combined with the substantial inconsistencies in Respondent's stated explanations, permit an inference of discrimination under *Reeves*. This case should be reversed and remanded to the district court for trial.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant this petition, and that upon final hearing it reverse the judgments of the Fifth Circuit and the trial court, and remand this case for trial on the merits. Petitioner prays for such further relief, at law or in equity, to which he may be justly entitled.

Respectfully submitted,

LAW OFFICE OF CHARLES MCGARRY
CHARLES W. MCGARRY
900 Jackson Street, Suite 600
Dallas, Texas 75202
(214) 748-0800
(214) 712-9254 fax

Attorney for Petitioner